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STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MPA/143613

PRELIMINARY RECITALS

Pursuant to a petition filed August 31, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on December 04, 2012, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly denied the Petitioner's request for occupational therapy services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

Written Appearance By: Mary Chucka
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.

2. On June 28, 2012, a PA request was submitted on behalf of the Petitioner by New Berlin Therapies (the provider) for occupational therapy services beginning June 19, 2012, 1x/week for 12 weeks at a cost of \$2,050. The PA request was denied by the agency on July 30, 2012.
3. The Petitioner is an 8 year old child diagnosed with autistic disorder and pervasive development disorder. He resides with his parents at home.
4. The Petitioner received intensive in-home ABA therapy treatment for 3 years. He was discharged from ABA therapy on January 28, 2012. He entered a post-intensive ABA therapy program.
5. The provider's Plan of Care (POC) contains the following long term goals for the Petitioner:
 - A. [Petitioner] will demonstrate improved visual motor integration, grasping, attention, praxis and self-regulation for age level ADLs. Baseline: minimal assistance and cueing for feeding, hygiene and dressing tasks. Maximal assist for bathing; demonstrates significant difficulties with sequencing self-help routines.
 - B. [Petitioner] will demonstrate improved visual motor integration, grasping, attention, praxis and self-regulation for age level fine motor skills. Baseline: visual motor integration is 71 months and grasping is 49 months.

The POC also contains the following short term goals for the Petitioner:

 - A. [Petitioner] will initiate and eat an entire snack using a spoon/fork independently 2 – 3x. Baseline: requires minimal assistance for initiation, sequencing and packing.
 - B. [Petitioner] will pour and drink liquid from an open cup with visual cues 2 – 3x. Baseline: does not use open cup due to sensory sensitivities with spilling
 - C. [Petitioner] will wash his face using a washcloth with visual cues 2 – 3x. Baseline: requires maximal assistance
 - D. [Petitioner] will tie shoes on a doffed item with moderate assistance 3 – 4x. Baseline: maximal assist for shoe tying. Manages other fasteners independently.
6. The Petitioner has an IEP from the School District of West Allis. He receives specialized instruction in academics, self-help and social skills; specialized instruction in functional communication (speech and language); occupational therapy services; regular physical education; regular vocational education; transportation; cueing and supervision; and collaboration with teaching assistants, therapists and specialists and parent input. In 2011, the Petitioner's school assessed Petitioner using the "Dunn Sensory Profile School Companion." The evaluation was used to assess the Petitioner's sensory processing in his school environment in comparison to his peers. His scores were nearly identical to the previous year. He demonstrated a Definite Difference in the area of auditory processing and behavior.
7. A PA request was submitted on June 21, 2012 on behalf of the Petitioner from Children's Hospital of Wisconsin requesting OT services. This PA request was denied on July 21, 2012. The Petitioner's mother testified at the hearing that she is not appealing this request. She testified that New Berlin Therapies had originally indicated it was not able to provide services to the Petitioner. The Petitioner's mother then sought services from CHOW. New B erlin Therapies subsequently indicated it could provide services and submitted the PA request which is the subject of this appeal.

DISCUSSION

Medical assistance covers occupational therapy if the recipient obtains prior authorization after the first 35 visits. Wis. Admin. Code, § DHS 107.17(2)(b). When determining whether a service is necessary, the agency must review, among other things, whether the service is medically necessary and an effective and

appropriate use of available services. Wis. Admin. Code, § DHS 107.02(3)(e)1 and 7. “Medically necessary” means a medical assistance service under ch. DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
- (b) Meets the following standards:
 - 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
 - 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided; . . .
 - 6. Is not duplicative with respect to other services being provided to the recipient;
 - ...

Wis. Admin. Code, § DHS 101.03(96m).

The agency found the request for services did not meet these listed criteria and that the services are not, therefore, medically necessary as that term is defined by the Medicaid regulations.

A. Services Consistent with the Prevention, Diagnosis or Treatment of the Recipient’s Illness, Injury or Disability

The agency contends that the OT services are requested to address Petitioner’s sensory processing issues and self-help skills. The PA request states that Petitioner was referred for OT evaluation due to “concerns with sensory processing difficulties and delays in self-help skills.” The OT evaluation notes that the Petitioner’s mother would like to develop a program to improve his sensory modulation for increased independence in his self-help skills. Petitioner’s mother indicated that she is concerned with his sensory seeking and that he hits himself up to 400x/hour.

The Department has ruled in earlier cases on the use of sensory techniques to treat those with autism. In Final Decision No. MPA-65/111878, the Department found that sensory techniques do not effectively treat autism and therefore occupational therapy relying on those techniques must be denied for autistic children.

Much of the provider’s POC is consistent with the notion that sensory issues lie at the root of the Petitioner’s problems. The long term goals refer to visual integration and self-regulation for ADLs and fine motor skills. The short term goals refer to self-care tasks. The PA request is for “sensory integration”, self-care management, and therapeutic activities. With the exception of shoe tying, the Petitioner appears physically able to complete the tasks but is unable to do so due to sensory issues. Thus, if the therapy is standard occupational therapy, the agency is correct that the Petitioner has not shown the medical necessity for OT. The Petitioner may have some fine motor skill deficits, but the provider has not established whether these are physical in nature or a byproduct of his autism and lack of self-control.

The agency noted that though the Petitioner has received services through AGA therapy and through the school, there is no documentation how the Petitioner’s abilities have changed or been maintained as a result of the OT services he received previously. A PA request may not be approved without objective measurable gains as a result of a provided service. The IEP mentions that the Petitioner has made slight progress but there are no objective measurable gains documented. Specifically, the IEP noted that the Petitioner’s scores on the Dunn Sensory Profile School Companion assessment were almost identical to the last year. There was a difference noted in auditory processing and behavior but there is no evidence that this was the result of the OT services. There was no or little difference noted in other areas assessed.

The agency also noted that the provider has not documented that the requested services are at a level that necessitates a skilled level of intervention. The Petitioner's diagnosis alone does not justify the a skilled level of intervention.

B. Services provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider, and the setting in which the service is provided.

The agency noted that the Petitioner is able to complete some tasks independently but requires cueing and supervision to initiate most tasks or to stay on task. There is no evidence that the requested services will change member's requirement for supervision to provide necessary cues or prompts throughout the day. The agency again argues that sensory integration is not proven to be effective with individuals with autism.

The agency further argues that a therapy evaluation must document not only what an individual can and cannot do but also why or why not the individual does not complete activities of daily living skills with greater independence or efficiency. In this case, the agency contends that the provider has not demonstrated why the Petitioner does not complete his daily activities except to identify that the lack of independence in completing daily routine is related to "sensory processing delays", "inability to initiate a task independently", and "limited attention." Thus, the provider has not demonstrated that the requested services will have predictable, functional results.

The agency contends that the requested services would be provided in a clinical setting without situations and circumstances that may be present when he needs to perform the skills being addressed in his home, school or community. The agency notes that it is harder to use skills gained from this therapy in other environments.

C. Duplication of Services

The agency has issued previous decisions regarding the duplication of services between school therapy and private therapy. Deputy Secretary Susan Reinardy held in DHA Final Decision No. MPA-37/80183, a speech therapy appeal, that "the deciding factor in whether services are duplicative is not the [therapy] technique utilized by the therapists, but the goals and outcomes being addressed by the therapists." *Id.* at 2. It does not matter, for example, if one provider addresses group activities with peers and the other one-on-one activities with an adult. A requested service duplicates "an existing service if the intended outcome of the two services is substantially the same." *Id.* at 3. Her decision specifically rejected additional therapy because the recipient "'needs' more intense services than the school provides." The holding rests on the principle that "Medicaid may not pay for two services if both services have the same intended outcome or result with respect to the medical condition the services are intended to address." *Id.* at 4. The deputy secretary has made it clear that the "intended outcome" test must be read broadly. In DHA Final Decision No MPA-49/82886, a decision reiterating the principle laid down in MPA-37/80183, she pointed out that the intended outcome was the same if both therapists were working to develop similar functional skills. The unstated rationale underlying the deputy secretary's decision, at least as it pertains to private therapy that duplicates school therapy is that federal law requires school districts to meet the special needs of its students and the department will not allow a district's failure to comply with this obligation to provide the reason for funding another source of therapy. The deputy secretary's decisions are binding on administrative law judges, meaning that they must follow those decisions.

In this case, the agency noted that the Petitioner's school assessed Petitioner using the "Dunn Sensory Profile School Companion." The Department argues that if the school assessed sensory processing, the requirement for an additional evaluation and treatment is not clear.

The agency also notes that there was no written treatment coordination plan between the school and the provider provided with the PA request.

CONCLUSIONS OF LAW

Based on the evidence submitted, the Petitioner did not meet his burden of proving that the requested services are medically necessary. The agency properly denied the Petitioner's request for OT services based on medical necessity.

THEREFORE, it is

ORDERED

That the petition be, and hereby is, dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 17th day of January, 2013

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 17, 2013.

Division of Health Care Access And Accountability